2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 9

SENTENCING PROCEDURES

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MAJ Tyler Harder
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2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

SENTENCING PROCEDURES

Outline of Instruction

I. INTRODUCTION.

II. SENTENCING PROCEDURES.

A. **R.C.M. 1001(b).** Government Pre-Sentencing Evidence.

1. Service data from the charge sheet. **R.C.M. 1001(b)(1).**

a. Name, rank, age.

b. Pay and allowances.

c. Prior and current service.

d. Restraint.

2. Personal data and character of prior service. **R.C.M. 1001(b)(2).**

a. "Under regulations of the secretary concerned trial counsel may obtain and introduce from the personnel records of the accused evidence of character of prior service."

b. These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation.

(1) US v. Clemente, 50 M.J. 36 (1999). The Government introduced two letters of reprimand over defense objection that the accused had neglected his child and that he had hit his wife. He was found guilty of attempted larceny, larceny, and larceny of mail. The court applied an abuse of discretion standard and held that it was a personnel record that did reflect past behavior and performance, 403 was not abused. This was not like *United States v. Zakaria,* 38 M.J. 280 (CMA 1993), where the evidence admitted was of sexual perversion in a case of the theft of property worth less than $100.

(2) United States v. Ariail, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3).

(3) United States v. Davis, 44 M.J. 13 (1996). Court upheld admission of USDB Discipline and Adjustment Board Report as representing accused's "service record as prisoner," based on waiver by defense in failing to object under R.C.M. 1001(b)(2). BUT: see J. Gierke, concurring based on waiver, but distinguishing *departmental* regulations from those of local field commands.

(4) United States v. Fontenot, 29 M.J. 244 (C.M.A. 1989). "Documents," handwritten statements, attached to DD Form 508s not admissible under R.C.M. 1001(b)(2). "Army policy clearly reflects an appropriate sensitivity to the need for some opportunity for the individual to become aware of unfavorable information that will be included in his personnel files and to respond to it." Id. at 248.

(5) United States v. Weatherspoon, 39 M.J. 762 (A.C.M.R. 1994). Admission of record of NJP from "holdings of Investigative Records Repository, U.S. Army Central Security Facility" was improper. R.C.M. 1001(b)(2) permits introduction of personnel records of the accused as evidence of the accused's prior service. ACMR finds that for the purposes of R.C.M. 1001(b)(2), "personnel records" are those contained in the Official Military Personnel File (OMPF), the Military Personnel Records Jacket (MPRJ), and the Career Management Individual File (CMIF).

c. Special foundation for admissibility of Records of Nonjudicial Punishment and Convictions by Summary Court-Martial.

(1) US v. Gammons, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial the trial counsel presented the court with the documents he intended to present during sentencing. When the judge saw the Article 15 he asked the defense counsel if he objected to the Article 15. Defense had no objection, and intended to use the Article 15 themselves. The court noted that there is no double jeopardy issue where an accused is court-martialed for an offense of which they have already received an Article 15. The court went on to point out that under Article 15(f) and *U.S. v. Pierce*, 27 M.J. 369, the defense had a gatekeeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

(2) United States v. Kelly, 45 M.J. 259, (1996). Reaffirmed holding in United States v. Mack, 9 M.J. 300 (1980), that "accused may properly object to admission of record of prior nonjudicial punishment [or summary court-martial] which does not recite that he was offered some opportunity to consult with counsel."

(3) United States v. Edwards, 46 M.J. 41 (1997). Whether or not a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, then for a prior Article 15 to be admissible at court-martial the accused must have had a right to consult with counsel regarding the Article 15.

(4) Must show opportunity to consult with counsel and that accused waived his/her right to demand trial by court-martial. United States v. Booker, 5 M.J. 238 (C.M.A. 1978); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

(5) Failure to object waives the foundational requirement unless plain error. United States v. Dyke, 16 M.J. 426 (C.M.A. 1983). Admission of record of nonjudicial punishment with no discernible signatures was such a deviation from customary practice that it was deemed plain error. See also United States v. Yarbough, 33 M.J. 122 (C.M.A. 1991). Even though nonjudicial punishment failed to indicate if appeal was complete, defense counsel's failure to object equals waiver.

(6) United States v. Rimmer, 39 M.J. 1083 (A.C.M.R. 1994). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted open or closed hearing.

d. No "rule of completeness." TC cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. See United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985). See Analysis to RCM 1001(b)(2).

e. 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. United States v. Delaney, 27 M.J. 501 (A.C.M.R. 1988) (Cannot use enlistment document to back door inadmissible prior arrests; cannot then use arrest record to rebut accused's attempted explanations of arrests). *Compare with* U.S. v. Ariail, 48 M.J. 285 (1998).

f. MJ must apply Mil. R. Evid. 403 balancing to R.C.M. 1001(b)(2) evidence. See United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that is properly documented in the accused's personnel records). See also United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993); and United States v. Zakaria, 38 M.J. 280 (C.M.A. 1993).

3. Evidence of prior convictions. **R.C.M. 1001 (b)(3).**

a. There is a "conviction" in a court-martial case when a sentence has been adjudged.

b. Juvenile adjudications are not convictions within the meaning of R.C.M. 1001(b)(3) and are therefore inadmissible in aggravation. United States v. Slovacek, 24 M.J. 140 (C.M.A. 1987).

c. Pendency of appeal. R.C.M. 1001(b)(3)(B).

d. United States v. Tillar, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). The AFCCA upheld admission of an 18-year old prior conviction, holding the only time limitation is in the balancing test under MRE 403. Where the accused faced sentencing for larceny and wrongful appropriation of military property, and had a prior conviction at special court-martial for larceny less than $100, the prior conviction was not inadmissible merely due to its age. The court specifically rejected the ten year limitation applicable to convictions for impeachment.

e. United States v. White, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under R.C.M. 1001(b)(3). TC offered in aggravation four warrants for bad checks which indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid required fines for offenses shown on warrants, and there was no indication by defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC. Court noted continuing lack of clarity in what is required to constitute prior conviction.

f. United States v. Glover, 53 M.J. 366 (2000). Accused was convicted of 84 specifications of uttering checks (valued at about $10,000) without sufficient funds. During the sentencing phase of the court-martial, trial counsel sought to introduce evidence of two prior convictions for passing bad checks in different counties in Georgia ten years earlier. It was unclear from the record if the military judge had applied a MRE 403 balancing test. CAAF held it would be error if the military judge did not apply the 403 test to sentencing evidence, but it determined that, even if there was error, it was harmless in this case. (The evidence of the prior convictions was already before the court, and the prior offenses were "insignificant relative to the current offenses.")

4. Evidence in Aggravation. **R.C.M. 1001(b)(4).**

a. United States v. Patterson, 54 M.J. 74 (2000). Accused was convicted of sexual abuse of his 9-year-old daughter over a period of several years. On sentencing, the government called a psychiatrist to testify regarding victim impact. During his testimony, he explained "grooming" (how pedophiles initially engage children and then prepare them for different types of sexual activity) and stated that he saw patterns of grooming in the present case. He further testified that there is no known effective treatment for those who groom young children. CAAF noted that the witness never expressly testified that accused was a pedophile, and, although the testimony regarding the accused's psychological state and lack of rehabilitative potential may be improper, it was not plain error. NOTE: In a concurring opinion, Judges Gierke and Sullivan felt it was error for the witness to stray "from his diagnosis of the victim to describing his 'assumption' that the victim was groomed by the appellant."

b. 1001(b)(4), Discussion: "May include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim . . . and evidence of significant impact on the mission, discipline, or efficiency of the command." As of 1 November 1999, the discussion section of R.C.M. 1001(b)(4) will also include the following, "In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

c. United States v. Mance, 47 M.J. 742 (N.M. Ct. Crim. App. 1997). Where evidence failed to link the accused either to a threatening phone call or to other uncharged assaults, then the evidence failed to meet the requirement of RCM 1001(b)(4) that it *directly related to or resulted from* the offenses of which accused was found guilty. NOTE: The court also noted "convictions on the major themes before the members had already occurred at this point, and . . . little was to be gained by this evidence, and much could be lost if appellant's substantial rights were abrogated."

d. United States v. Sanchez, 47 M.J. 794 (N.M. Ct. Crim. App. 1998). Evidence from assault victim -- including extent of injuries suffered, hospitalization and general adverse effects of assault, pictures of wounds, and record of medical treatment of victim -- showed the seriousness of the underlying offense, and the seriousness of misprision of aggravated assault depends upon the nature and circumstances of the particular underlying aggravated assault. While the evidence in aggravation under R.C.M. 1001(b)(4) did not *result from* the misprision conviction, it did *directly relate* to the offense, and was therefore admissible. The MJ properly overruled the defense objection that such evidence related to the underlying assault, and not to misprision of which the accused was convicted.

e. United States v. Wilson, 47 M.J. 152 (1997). Notwithstanding disrespectful comments made outside presence of individual, impact on that disrespected officer constitutes relevant victim-impact evidence under R.C.M. 1001(b)(4). Accused convicted of disrespect for commenting to another party that, "Captain Power, that #$^%%# %$#^ is out to get me." Disrespected officer testified at sentencing to "concern" statement caused her, and court held directly related sufficiently to constitute proper aggravating evidence.

f. United States v. Jones, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to max. In imposing sentence, military judge (MJ) criticized, "[y]our disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances...." Accused claimed sentenced for offense for which not found guilty, but court held medical condition fact directly related to offense under R.C.M. 1001(b)(4) and essential to understanding of circumstances surrounding offense.

g. United States v. Zimmerman, 43 M.J. 782 (Army Ct. Crim. App. 1996). Accused's motive is a proper and useful factor in determining an appropriate sentence. Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense. First Amendment was not violated by MJ's instruction that if members believed accused's knowledge was a factor in deciding to give the group munitions, members could consider nature of group for its tendency to put potentially dangerous materials into the civilian community as it bore on accused's sense of responsibility.

h. United States v. Gargaro, 45 M.J. 99 (1996). Army captain charged with number of offenses related to bringing AK-47 rifles back to Fort Bragg from Saudi Arabia. A civilian drug dealer triggered the investigation when he was arrested with an automatic AK-47, and said he obtained it from a Fort Bragg soldier. Gargaro argued there was no showing that rifle was in the batch he shipped from Saudi Arabia, and therefore it was not evidence directly relating to or resulting from his offenses. The court found the evidence showed the extent of the conspiracy and responsibility of the accused commander, and any unfair prejudice that weapon found in hands of drug dealer was outweighed by the probative value showing facts and circumstances surrounding investigation of charged offenses. Also, judge alone case, and court deferred to MJ giving appropriate weight to evidence.

i. United States v. Streetman, 43 M.J. 752 (A.F. Ct. Crim. App. 1995). Accused ordered to submit urine sample as part of random urinalysis. Accused dragged out time in which had to supply sample, and court notes efforts to stall taking of urine specimen to maximize time available for body to rid itself of substance was proper matter in aggravation.

j. United States v. Rust, 41 M.J. 472 (1995). Accused/physician failed to admit/treat soldier's spouse for premature labor, resulting in conviction for dereliction. The baby died three days after birth, and father/lover killed woman and then himself, leaving detailed, poignant note. Prejudicial error to admit note in aggravation phase of physician's trial. Too attenuated *even if* could establish link between accused's conduct and murder-suicide, and clearly fails 403 test.

k. United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). A reasonable linkage is required between the offense and the alleged effect.

l. United States v. Wingart, 27 M.J. 128 (C.M.A. 1988). Uncharged misconduct is irrelevant for sentencing unless the aggravation directly relates to or results from one of the accused's offenses. Mil. R. Evid. 404(b) evidence no longer admissible unless directly related to offense(s) found guilty. See also United States v. Mullens, 28 M.J. 574 (A.C.M.R. 1989).

5. Evidence of rehabilitative potential. **R.C.M. 1001(b)(5).**

a. "Rehabilitative potential" refers to the accused's potential to be restored . . . to a useful and constructive place in society."

b. May present opinion evidence concerning potential for rehabilitation. R.C.M 1001(b)(5)(A).

c. Sufficient information and knowledge about accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense.". R.C.M. 1001(b)(5)(B).

(1) Quality of the opinion depends on the foundation. United States v. Boughton, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions should be based on personal observation, but may also be based on reports and other information provided by subordinates.

(2) United States v. Powell, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts. Testimony to the effect the accused "had problems paying his rent," "was late for work and had financial problems," and as to his "loss of military identification card, his financial irresponsibility, and his bad checks," constituted improper foundation evidence.

d. Defense can't sandbag. United States v. Sylvester, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehab potential is not *per se* inadmissible merely because defense counsel establishes on cross examination that witness's assessment goes only to potential for *military* service. Once proper foundation for opinion has been established, such cross examination goes to weight, not to admissibility.

e. Opinion evidence of rehabilitative potential may not be based solely on the severity of the offense. R.C.M. 1001(b)(5)(C); United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

f. The scope of the evidence must be limited to whether the accused has *rehabilitative potential,* not an opinion regarding appropriateness of punitive discharge for accused. R.C.M. 1001(b)(5)(D).

(1) United States v. Williams, 50 M.J. 397 (1999). The Government introduced the testimony of the accused's company commander regarding the accused's rehabilitative potential. After the trial counsel laid a proper foundation for the company commander's opinion the following occurred: Q: "Based on your experience...do you have an opinion as to whether the accused is capable of rehabilitation. And what is it?" A: "No."
Q: "Tell me why."
A: "We have tried. We have spent numerous hours counseling him. We have tried verbal counseling, letters of counseling, letter of reprimand, Article 15's, and they won't work…I just wanted to administratively discharge him.". An opinion offered under R.C.M. 1001(b)(5) is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. Also witnesses are not allowed to use euphemisms for recommending a punitive discharge such as "No potential for continued service" or "he should be separated." Here the company commander went beyond the scope of what she was allowed to testify about by commenting on why she felt the accused had no potential for rehabilitation. The company commander also used a euphemism to recommend a punitive discharge by stating repeatedly that all she wanted to do was administratively discharge the accused.

(2) United States v. Yerich, 47 M.J. 615 (Army Ct. Crim. App. 1997). It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. Whether the words used by the witness constitute a euphemism, however, depends on the circumstantial context. Where a Sergeant First Class testified the accused had no "military rehabilitation" potential, the witness really was commenting on his opinion as supervisor, and not intending euphemistically to encourage a discharge. The court also noted that the NCO testifying before an officer panel did not constitute any exercise of undue influence.

(3) No euphemisms - United States v. Aurich, 31 M.J. 95 (C.M.A. 1990). Aurich's company commander is permitted to testify over defense objection that he does not want Aurich back in his unit. HELD: Absent an explanation, that is not permitted by the rule, the Commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(4) Same rules may apply against the defense - "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" United States v. Ramos, 42 M.J. 392, 396 (1995).

g. Specific acts? R.C.M. 1001(b)(5)(E and F).

(1) On direct, may not introduce specific acts of uncharged misconduct that form the basis of the opinion. United States v. Rhoads, 32 M.J. 114 (C.M.A. 1991).

(2) On cross-examination the defense counsel can explore specific incidents of conduct.

(3) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. United States v. Clarke, 29 M.J. 582 (A.F.C.M.R. 1989). See also United States v. Gregory, 31 M.J. 236 (C.M.A. 1990).

h. Rebuttal Witnesses. United States v. Pompey, 33 M.J. 266 (C.M.A. 1991). Rehabilitative potential evidence rules (Ohrt/Horner) apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings.

i. Absence of rehabilitative potential is a factor for consideration in determining a proper sentence. It is not a matter in aggravation! United States v. Loving, 41 M.J. 213 (C.M.A. 1994), *aff'd,* 116 S.Ct. 1737 (1996). MJ's characterization of accused's disciplinary record and his captain's testimony about accused's duty performance as aggravating circumstances (in a capital case!), was error since lack of rehabilitative potential is not an aggravating circumstance.

j. United States v. Williams, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

k. US v. Scott, 51 M.J. 326 (1999). Contrary to his pleas the accused was convicted of several offenses to include rape, larceny, robbery and kidnapping. During the presentencing phase of trial the Government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. The court held there was no evidence to indicate that the Government witness had examined the full sanity report regarding the accused. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. The court concluded there was no plain error in this case where the doctor basically testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

l. United States v. George, 52 M.J. 259 (2000). A social worker testified that the accused's prognosis for rehabilitation was "guarded" and "questionable." CAAF noted that evidence of future dangerousness is a proper matter under R.C.M. 1001(b)(5).

m. United States v. McElhaney, 54 M.J. 120 (2000). Accused was charged with 11 offenses stemming from a sexual relationship with his wife's minor niece. During the government sentencing case, a child psychiatrist testified regarding specific victim impact and the accused's rehabilitative potential. Despite the fact he had not examined the accused or reviewed his medical or personnel records, and testified he was unable to render a diagnosis of pedophilia without examining the accused, the psychiatrist was permitted to state that the accused's behavior was "consistent" with a pedophile's profile. CAAF held it was error for the military judge to allow the testimony regarding future dangerousness of the accused as related to pedophilia. However, CAAF did not decide whether such testimony materially prejudiced the accused since the sentence was set aside on other grounds. NOTE: Chief Judge Crawford and Judge Sullivan dissented with regard to this issue. They both stated that his testimony regarding the accused's future dangerousness was admissible under R.C.M. 1001(b)(5).

n. United States v. Phelps, No. 9601351 (Army Ct. Crim. App. May 29, 1997). "[N]othing prevents the prosecution from presenting evidence of the accused's rehabilitative potential before the defense raises the issue, as long as the government lays a proper foundation and presents the evidence in proper form."

o. United States v. Hughes, No. 9501978 (Army Ct. Crim. App. May 5, 1997). Where expansive answer by witness to trial counsel's (TC) question was not a clear statement for a punitive discharge, the court held there was not a violation of R.C.M. 1001(b)(5). The court also noted the witness was the unit first sergeant (1SG) testifying before an officer panel, and therefore there was not a command influence problem.

p. United States v. Powell, 45 M.J. 637 (N.M.Ct.Crim.App. 1997). Rehabilitative potential evidence is proper under R.C.M. 1001(b)(5), but it is improper for TC to elicit specific instances of conduct to establish a foundation for the witness's opinion.

6. Additional Matters. R.C.M. 1001(f).

a. Plea of guilty is a mitigating factor.

b. Evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

c. Statements made during providence inquiry in guilty plea.

(1) United States v. Figura, 44 M.J. 308 (1996). Court found no demonstrative right or wrong way to introduce evidence from providence inquiry, but MJ should permit parties to choose method of presentation, and defense here chose functional equivalent of oral stipulation of fact conveyed to members by MJ. At sentencing TC sought to introduce part of providence inquiry because stipulation of fact lacked certain information regarding checks written by accused. In order to present information to members, MJ gave defense option of witness who heard inquiry testifying, court reporter testifying, or MJ giving as part of instruction. Defense opted for MJ and waived any objection based on MJ becoming witness to proceeding.

(2) United States v. Holt, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

(3) How to do it: authenticated copy, witness, tapes (United States v. Irwin, 42 M.J. 479 (1995).

7. "Aggravation evidence" in stipulations of fact.

a. United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

(1) Inadmissible evidence may be stipulated to (subject to R.C.M. 811(b) "interests of justice" and no government overreaching).

(2) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

b. United States v. DeYoung, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible.

c. United States v. Vargas, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits and there is no evidence of government overreaching.

8. Three-step process for analyzing sentencing matter presented by the prosecution via R.C.M. 1001(b):

a. Does the evidence fit one of the enumerated categories of R.C.M. 1001(b)?

b. Is the evidence in an admissible form? United States v. Bolden, 34 M.J. 728 (N.M.C.M.R. 1991).

c. Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? Mil. R. Evid. 403. United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

B. The Case in Extenuation and Mitigation. **R.C.M. 1001(c).**

1. Extenuation. R.C.M. 1001(c)(1)(A).

a. Serves to explain the circumstances surrounding the commission of the offense, including those reasons which do not constitute a legal justification or excuse.

b. US v. Loya, 49 M.J. 104 (1998). The accused was charged with murder and found not guilty of that offense but guilty of involuntary manslaughter by culpably negligent conduct. The accused accidentally stabbed a fellow soldier in the chest. Defense wanted to introduce testimony that but for improper medical treatment the victim might not have died. The judge refused to allow the testimony, ruling that it was irrelevant. CAAF found that the service court and the trial judge were incorrect. The evidence should have been admitted. The court stated that the testimony of the defense witness would have given a more complete and full picture of the circumstances surrounding the crime. Moreover the defective care given the victim may have contributed to the victim's death, a fact which might logically reduce the accused's blame.

2. Mitigation. R.C.M. 1001(c)(1)(B).

Personal factor(s) concerning the accused introduced to lessen the punishment to be adjudged, e.g., evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

a. US v. Pauling, 9700685 (Army Ct. Crim. App. 1999). During the extenuation/mitigation phase of the court-martial defense counsel (after laying a proper foundation) asked a witness about the accused's potential for rehabilitation. The trial counsel objected and the judge sustained the objection. The court stated that an accused's potential for rehabilitation is a proper and frequent component of a court-martial's sentencing procedures. Further, defense witness' opinion as to an accused's rehabilitative potential is proper evidence.

b. United States v. Simmons, 48 M.J. 193 (1998). The MJ prohibition on the accused from offering evidence of a civilian court sentence for the same offenses subject of his court-martial constituted error. By precluding such evidence, the MJ prevented the accused from showing he had already been punished for his misconduct.

c. United States v. Demerse, 37 M.J. 488 (C.M.A. 1993). Counsel should pay particular attention to awards and decorations based on combat service.

d. United States v. Sumrall, 45 M.J. 207 (1996). CAAF recognizes right of retirement-eligible accused to introduce at sentencing evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

e. United States v. Greaves, 46 M.J. 133 (1997). The MJ should give some instructions when the panel asks for direction in important area of retirement benefits. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

f. United States v. Becker, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."

3. Statement by the accused. R.C.M. 1001(c)(2).

a. It is the accused's choice as to the type of statement made by the accused.

See United States v. Proctor, 34 M.J. 549 (A.F.C.M.R. 1992) (accused makes sworn-narrative statement = disaster).

b. Sworn statement by accused. R.C.M. 1001(c)(2)(B).

(1) Subject to cross-examination by trial counsel, military judge, and members.

(2) Rebuttable by:

(a) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(b) Evidence of bias, prejudice, or any motive to misrepresent. R.C.M. 608(c).

(c) Extrinsic evidence of prior inconsistent statements. R.C.M. 613.

c. Unsworn statement by accused. R.C.M. 1001(c)(2)(C).

(1) May be oral, written, or both.

(2) May be made by accused, counsel, or both.

(a) United States v. Grill, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. CAAF noted the MJ has an opportunity to place an unsworn statement in context through instructions to the panel, as well as the trial counsel (TC) in rebuttal and closing argument. It was error for the MJ at sentencing to sustain the TC's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e.*, not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(b) United States v. Jeffery, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence -- *e.g.*, the possibility of receiving an administrative rather than punitive discharge -- does not render it inadmissible. "We have confidence that properly instructed court-martial panels can place unsworn statements in the proper context…."

(c) United States v. Britt, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Thus, it was error for the MJ to restrict the accused from indicating in his unsworn statement that his commander would administratively separate him if the court-martial did not adjudge a punitive discharge.

(3) Not subject to cross-examination.

(a) See United States v. Grady, 30 M.J. 911 (A.C.M.R. 1990). Improper for MJ to question the unsworn accused.

(b) United States v. Martinsmith, 37 M.J. 665 (A.C.M.R. 1993). Accused who makes unsworn statement has no procedural right to respond to questions by the members; discretionary with the military judge.

(4) TC may rebut any statements of fact contained therein (but not opinions).

(a) United States v. Manns, 5454 M.J. 164 (2000). The accused was convicted of indecent acts, indecent assault and disorderly conduct. During presentencing, he made an unsworn statement stating "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country." In rebuttal, the government introduced a psychological evaluation in which the accused admitted to using marijuana prior to enlistment, committing adultery, using prostitutes, and looking at pornography. Accused argued that his statement was not one of fact and not subject to rebuttal. CAAF disagreed, holding that his statement was an assertion of fact and that the accused's admission to marijuana use was permissible rebuttal. They further held that the remaining admissions were admissible not only on the grounds of rebuttal, but also under R.C.M. 1001(b)(4) to show the depth of the accused's sexual problem.

(b) United States v. Willis, 43 M.J. 889 (A.F. Ct. Crim. App. 1996). Accused convicted of premeditated murder offered evidence at sentencing phase to show he expressed profound remorse for murder. Government responded with inconsistent statements made previously by accused, on psychological questionnaire and audio tape of telephone message to brother of victim. Prior statements reflected lack of remorse and gloating triumph over crime. Court held proper rebuttal since accused's statements of remorse constituted statements of fact, enabling government to rebut with contrary evidence.

(c) United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service...." TC introduces numerous items of uncharged misconduct. HELD: Accused's statement was not a "statement of fact. Instead, in context, it was more in the nature of an opinion--indeed, an argument."

(d) United States v. Thomas, 36 M.J. 638 (A.C.M.R. 1992). Unsworn, accused commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, the extenuating circumstances surrounding his offenses, and his apologies to the Army and the victim. TC recalled 1SG, who testified, over defense objection, that accused was not a truthful person. HELD: Improper rebuttal. The accused made no claim of truth or veracity; therefore, his character for truthfulness was not at issue.

4. Relaxed rules of evidence. R.C.M. 1001(c)(3).

MJ may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence (R.C.M. 1001(c)(3)). United States v. Austin, 38 M.J. 578 (A.C.M.R. 1993). Relaxed rules do not remove requirement that evidence be relevant.

5. Witnesses.

a. Who Must The Government Bring?

United States v. Mitchell, 41 M.J. 512 (A.C.M.R. 1994). MJ did not err by denying accused's request for Chief of Chaplains as character witness on sentencing. While acknowledging accused's right to present material testimony, court upheld MJ's discretion in determining the form of presentation. Proffered government stip detailed the witness's background, strong opinions about the accused and government's refusal to fund the witness's travel.

6. The defense may not present evidence or argument which challenges or re-litigates the prior guilty findings of the court. United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

C. Argument.

1. United States v. Jenkins, 54 M.J. 12 (2000). Accused was convicted of wrongfully using and making a military ID card, 37 specifications of larceny, and 25 specifications of forgery. During sentencing argument, the TC argued that the accused "lied on the stand" and "has no rehabilitative potential" referring to him as a "thief" and a "liar." There was no objection to these comments by DC. CAAF seemed to imply, but did not clearly state, the argument was error and, applying "plain error" analysis, found no material prejudice to the accused. Chief Judge Crawford concurred in the result but found no error in the TC's argument.

2. United States v. Baer, 53 M.J. 235 (2000). Accused pled guilty to robbery, aggravated assault, conspiracy, kidnapping, and murder (of a fellow marine). During sentencing argument, the ATC asked members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." DC objected on the grounds of improper argument but the MJ disagreed. CAAF stated that such "Golden Rule arguments" are impermissible, however, when viewing the ATC's argument in its entirety, they found "no basis for disagreeing with the lower court's conclusion that the . . . argument was not calculated to inflame the members' passions." Further, "we do not view the improper Golden Rule argument to have been egregious enough to call for overturning the sentence."
NOTE: In a concurring opinion, Judge Effron (joined by Judge Sullivan) felt the argument, viewed in context, was improper and that the military judge erred in allowing it. The majority opinion also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them" are risking reversal.

3. United States v. Stargell, 49 M.J. 92 (1998). During sentencing argument TC argued the appellant "will get an honorable retirement unless you give him a BCD." DC did not object. The appellant had 19 and 1/2 years in service. When, as in this case, an accused is "knocking at retirement's door" the impact of a punitive discharge on retirement benefits is not irrelevant or collateral. In argument the Government can strike hard blows just not foul ones. Counsel may refer to evidence of record and "such fair inferences as may be drawn therefrom". Counsel may also ask members to draw on ordinary human experience and matters of common knowledge in the military community (routine personnel action).

4. United States v. Weisbeck, 48 M.J. 570 (Army Ct. Crim. App. 1998). An accused is only to be sentenced at a court-martial for the offenses of which he is convicted, and not for uncharged or other offenses of which he is acquitted. It is improper argument for trial counsel to refer the panel to other acts of child molestation, of which the accused was tried and acquitted at a previous court-martial. The prior incidents were admitted under MRE 404(b) on the merits, but were not properly a basis for an increased sentence of the accused.

5. United States v. Hampton, 40 M.J. 457 (C.M.A. 1994). Stipulation of expected testimony admitted during presentencing stated that in witness' opinion, accused does not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." Citing Ohrt, CMA held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper. The witness would not have been permitted to make a recommendation for a punitive discharge in the first instance. Accordingly, trial counsel may not put the prohibited recommendation in the witness' mouth in argument.

D. Instructions.

1. United States v. McElroy, 40 M.J. 368 (C.M.A. 1994). During presentencing proceedings, the president asked the MJ about the effects of a punitive discharge on veteran's benefits. The MJ instructed the members that it is not the practice of courts-martial to be concerned with administrative effects of various courts-martial. He added, however, that punitive discharges deprive one of virtually all veterans benefits except those "vested benefits" from a prior period of honorable service. Court found that the MJ's actions did not amount to plain error.

2. United States v. Duncan, 53 M.J. 494 (2000). Accused was found guilty of attempted murder, attempted robbery, attempted forcible sodomy, conspiracy, rape, kidnapping, forcible sodomy, larceny, carrying a concealed weapon, and communicating a threat. At sentencing, the members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Over defense objection the judge provided an instruction to the members that explained: parole was available, even to someone with a life sentence, but the members should not be concerned with the impact of parole; that appropriate alcohol and sex offense programs were available to the accused should he be confined. CAAF stated that instructions on collateral consequences were permitted, but needed to be clear and legally correct. It was appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations. In this case, the panel's inquiries were related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society.)

III. SENTENCING.

A. What May be Considered. RCM 1006.

1. Notes of the members.

2. Any exhibits.

3. Any written instructions.

a. Instruction must have been given orally.

b. Written copies, or any part thereof, may also be given to the members unless either party objects.

4. Statements made during providence inquiry and properly admitted.

5. Pretrial agreement (PTA) terms.

R.C.M. 705(e). Except in a court-martial without a military judge, **no** member of a court-martial shall be informed of the existence of a PTA.

B. Deliberations and Voting on Sentence. R.C.M. 1006.

Garrett v. Lowe, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

C. Announcement of Sentence. R.C.M. 1007.

1. Sentence worksheet is used to put the sentence in proper form (See Appendix 11, MCM, Forms of Sentences).

2. President or military judge makes announcement.

3. Polling prohibited. Mil. R. Evid. 606.

D. Reconsideration of Sentence. R.C.M. 1009.

1. Time of reconsideration.

a. May be reconsidered any time before the sentence is announced (recent change).

b. After announcement, sentence may not be increased upon reconsideration unless sentence was less than mandatory minimum.

2. Procedure.

a. Any member may propose reconsideration.

b. Proposal to reconsider is voted on in closed session by secret written ballot.

3. Number of votes required.

a. With a view to increasing sentence - may reconsider only if at least a majority votes for reconsideration.

b. With a view to decreasing sentence - may reconsider if more than one-third vote for reconsideration.

(1) For sentence of life or more than 10 years, more than one-fourth vote for reconsideration.

(2) For death sentence, only one vote to reconsider required.

4. Objections Required!

United States v. Moreno, 41 M.J. 537 (N.M.C.M.R. 1994). R.C.M. 1109 does not permit members to consider any punishments increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. MJ erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted without regard to whether it was with a view to increasing or decreasing the sentence. (But, court rules error harmless in absence of objection by defense counsel!)

E. Impeachment of Sentence. R.C.M. 1008. Same rules as impeachment of findings.

IV. PERMISSIBLE PUNISHMENTS.

A. ***Article 19, UCMJ.*** Congress amended Article 19 (affecting cases referred on or after 1 April 2000) by increasing the maximum authorized period of confinement and forfeitures that a special court-martial can adjudge from six months to one year. Until the President changes R.C.M. 201(f)(2)(B), however, the maximum punishment at a special court-martial will remain the same.

B. Death. R.C.M. 1003(b)(10).

1. Death may be adjudged in accordance with R.C.M. 1004 (mechanics, aggravating factors, votes). Loving v. United States, 116 S.Ct. 1737 (1996).

2. Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

3. Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under R.C.M. 1004(c), (3) that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

4. United States v. Curtis, 46 M.J. 129 (1997). In capital case where accused sentenced to death for two counts of premeditated murder, CAAF found ineffective assistance of counsel in failing to present all available mitigating evidence, and set aside death sentence.

5. United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996). Court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder.

6. United States v. Thomas, 46 M.J. 311 (1997). In capital sentencing procedures under R.C.M. 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the MJ instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. CAAF held R.C.M. 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." The court further noted the particular significance in capital litigation to vote on the least severe sentence first, since a single vote would defeat a sentence of death.

C. Deprivation of Liberty.

1. Confinement. R.C.M. 1003(b)(8).

   FY98 Appropriations Act creates new UCMJ article 56a for new punishment of "confinement for life without eligibility for parole."

2. Instruction on Allen Credit.

   United States v. Balboa, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get 68 days Allen credit. Of course, the panel adjudges a BCD, confinement for 12 months and 68 days.

3. Hard labor without confinement R.C.M. 1003(b)(7). (3 months - enlisted only).

4. Restriction. R.C.M. 1003(b)(6). (2 months).

D. Deprivation of pay.

1. Forfeiture of pay and allowances. R.C.M. 1003(b)(2).

a. MCM change effective 1 April 1996: R.C.M. 1003(b)(2,5).

(1) **Art. 58b, UCMJ:** Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of BCD-SPCM courts, subject to conditions below, shall forfeit 2/3 of pay during confinement.

Sentences covered by above:

(a) Confinement of MORE THAN 6 months, or death, or
(b) ANY confinement AND a DD, BCD, or dismissal.

If accused has dependents, Convening Authority (CA) may waive any/all forfeitures for period NTE 6 months, BUT that money shall be paid to the dependents of the accused.

(2) **Art. 57(a), UCMJ:** ANY forfeiture of pay or allowances (or reduction) in a court-martial sentence takes effect on the earlier of:

(a) 14 days after sentencing, or

(b) date on which CA approves sentence.

On application of accused, CA may defer forfeiture or reduction until approval of sentence, but CA may rescind such deferral at any time and with no due process requirement.

b. United States v. Dewald, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement. Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month.

c. Partial. Must be stated in a whole dollar amount for a specific number of months. See United States v. Riverasoto, 29 M.J. 594 (A.C.M.R. 1989).

d. Must state time certain. United States v. Frierson, 28 M.J. 501 (A.F.C.M.R. 1989).

2. Fine.

a. United States v. Tualla, 52 M.J. 228 (2000). The accused was sentenced to a BCD, 5 months confinement, reduction to E-2, forfeiture of one-third pay/month for 6 months, and a fine of $996.60. The CGCCA disapproved the fine, holding that R.C.M. 1003(b)(3) and the enactment of Article 58b (automatic forfeiture provisions) prevent a SPCM from imposing a sentence that combines a fine and forfeitures. CAAF found the holding to be error, stating that a SPCM is not precluded from imposing a sentence that includes both a fine and forfeitures where the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a SPCM.

b. United States v. Smith, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. (Sentence set aside by CAAF on other grounds.)

(1) MJ included fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first."

(2) ACCA found fine permissible punishment:

(a) no legal requirement that accused realize unjust enrichment from offenses committed before fine may be adjudged;

(b) $100,000 fine not excessive and disproportionate given reprehensible nature of offense and fact could have received fine of $250,000 in Federal District Court;

(c) BUT, fine enforcement provision fashioned so as to attempt to defer for years the point at which accused might otherwise be released on parole is not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

c. United States v. Williams, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment there are no limits on the amount of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

d. United States v. Motsinger, 34 M.J. 255 (C.M.A. 1992). MJ's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

e. United States v. Morales-Santana, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." Court disapproved the fine.

f. United States v. Harris, 19 M.J. 331 (C.M.A. 1985). Special and summary courts-martial can impose both forfeitures and a fine in the same case so long as the total amount of money involved does not exceed the total amount of forfeitures authorized.

E. Punitive Separation. R.C.M. 1003 (b)(9).

1. Dismissal - commissioned officers and warrant officers who have been commissioned. See United States v. Carbo, 37 M.J. 523 (A.C.M.R. 1993).

United States v. Stockman, 43 M.J. 856 (N.M.Ct.Crim.App. 1996). Accused warrant officer convicted of various offenses relating to bringing firearms back from Saudi Arabia and sentenced, *inter alia,* to dismissal by court-martial. BUT, at time of trial accused was not a commissioned warrant officer, and therefore only authorized punitive separation was dishonorable discharge. Court defines critical issue as accused's status at time of trial, which after DuBay hearing was determined to be as non-commissioned warrant officer. Court recognized no difference in severity of punishment as between dismissal and dishonorable discharge, and acknowledged intent of court-martial to separate accused from service. Therefore, NMCCA converted adjudged dismissal to dishonorable discharge.

2. Dishonorable discharge - non-commissioned warrant officers or enlisted.

3. Bad-conduct discharge - only enlisted.

4. United States v. Zander, 46 M.J. 558 (N.M.Ct.Crim.App. 1997). Sentence including dismissal was not inappropriately severe for accused convicted of false official statement, conduct unbecoming an officer and wearing unauthorized awards. The court sentenced the accused to dismissal, seven years confinement, total forfeitures; and a pretrial agreement (PTA) suspended all confinement beyond 120 days and forfeitures beyond $750 per month. The court noted the great benefits to accused in the PTA in upholding the dismissal.

F. Reductions in grade - UCMJ art. 58a.

1. "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes--

a. a dishonorable or bad-conduct discharge;

b. confinement; or

c. hard labor without confinement; reduces that reduces that member to pay grade E-1."

2. Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. United States v. Sloan, 35 M.J. 4 (C.M.A. 1992).

G. Maximum Punishment. See Manual for Courts-Martial, Appendix 12.

1. Generally - lesser of jurisdiction of court or punishment in Part IV.

2. Offenses not listed in the Table of Maximum Punishments.

a. Included or related offenses.

b. United States Code.

3. Habitual offenders. R.C.M. 1003(d).

a. Three or more convictions within one year - DD, TF, one year confinement.

b. Two or more convictions within three years - BCD, TF, three months confinement.

c. Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

H. Article 133 punishment.

United States v. Hart, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-spec.

I. Prior Punishment Under Art. 15 for Same Offense.

1. United States v. Edwards, 42 M.J. 381 (1995). When accused has received NJP for same offense, MJ may -- upon defense request -- give day-for-day, dollar-for-dollar, and stripe-for-stripe credit, obviating need for CA to do so, when enforcing United States v. Pierce, 27 M.J. 367 (C.M.A. 1989). *See also* United States v. Strickland, 36 M.J. 569 (A.C.M.R. 1992) (Soldier must be given credit day-for-day, dollar-for-dollar, stripe-for-stripe); and United States v. Gammons, 51 M.J. 169 (1999).

2. United States v. Flynn, 39 M.J. 774 (A.C.M.R. 1994). When MJ is sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

3. United States v. Blocker, 30 M.J. 1152 (A.C.M.R. 1990). Accused was entitled to Pierce credit for administrative elimination reduction.

J. Sentence Credit.

1. United States v. Rock, 52 M.J. 154 (1999). The accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement. The military judge credited the 240 days against the accused's adjudged sentence, not the approved sentence. The court held that military judge correctly accounted for the pretrial punishment credit. The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits and they come off of the approved sentence (i.e. what ever the sentence is after the pretrial agreement has been figured in). Pretrial punishment credit for something other than confinement (like restrictions on liberty that does not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. The court uses strong language in the case which might be misleading "No authority has been given to them [military judges] to embellish or embroider these agreements [pretrial agreements]. Thus, credit against confinement awarded by a military judge always applies against the sentence adjudged…unless the pretrial agreement itself dictates otherwise." The fact is, if the military judge determines that Allen, Mason, or Suzuki credit is warranted that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

2. United States v. Rosendahl, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, 4 months confinement, and suspended forfeitures in excess of $350 per month for 4 months and suspended reduction below the grade of E-4. The case was returned for a rehearing at which he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days confinement he served as a result of his first sentence. CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

V. CONCLUSION.